for The Defense

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Special Actions: The "Express Lane" of Appeals

By Donna Elm and Mara Siegel

Special actions. They are a type of speedy, limited appeal, usually of pre-trial rulings. They are called "extraordinary writs" for a reason. Only extraordinary circumstances warrant special actions.

Arizona Court of Appeals Judge Noel Fidel analogizes the situation to patrons standing patiently in line waiting to buy bread at a bakery. Suddenly, a customer bursts through the door, runs to the head of the line, and demands that the bakers stop their normal business and prepare a special order for him. The bakers and customers may accommodate him, but only if he gives a good reason for preferential treatment; he must establish urgent need.

For a court to take jurisdiction in a special action, however, the degree of "urgency" is substantially greater. The people ahead in line at the Court of Appeals may have been waiting for years. Presently, there are approximately 3600 appeals in line at Division One. Most of the criminal cases have been serving time in D.O.C. Your client's pre-trial issues pale in comparison.

When you file a special action, you run to the head of the persons waiting in line and demand, "Take me first! And make this a rush!" You must demonstrate your "urgency". The next section discusses when special actions are appropriate.

I. What Circumstances Warrant Special Actions

Special actions are permitted under three conditions. The first occurs when the trial court "has failed to exercise discretion which he has a duty to exercise, or to perform a duty required by law as to which he has no discretion". Rule 3(a), Ariz. R. P. Spec. Act. (hereafter, "Rule _"). For example, refusing to transfer the case despite a timely request for a new judge. The second occurs when the trial court "has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority". Rule 3(b). For instance, proceeding under the wrong venue. The third occurs when the judge's "determination was arbitrary or capricious or an abuse of discretion". Rule 3(c). For example, a clearly erroneous ruling on a grand jury remand motion.

Of those three conditions, the first two (violating a duty imposed by law and exceeding jurisdiction/authority) generally present a stronger case than the third (abuse of discretion) because the first two provide fairly "bright line" standards, compared to the expressly discretionary third. Keep in mind how hesitant appellate courts are to overrule discretionary decisions in appeals.

These rules sound extremely liberal. However, they are tempered: "the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal". Rule 1(a). Thus, it may not be enough that your client might have to wait several years pending appeal; nor that he expects to prevail on appeal, so why not resolve it now?; nor that the issue has wide impact; nor that it is one of first impression. Persons already waiting in line with appeals can claim those ordinary circumstances. Rule 1(a) therefore adds the requirement of "urgency". Circumstances establishing sufficient "urgency" to give your case "express lane" treatment are discussed next.

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A. Non-Appealable Rulings

The only opportunity for review of a non-appealable ruling is through special action. In criminal practice, non-appealable issues include remands for new determinations of probable cause,[1] review of decisions in A.R.S. Section 13-3601 (domestic violence diversion), and almost all rulings against the State.

Non-appealable issues can be proper subjects of special actions because there truly is no "plain, speedy, and adequate remedy by appeal". Rule 1(a). Usually, the petitioner argues that the trial court's decision was arbitrary and capricious, or an abuse of discretion. Rule 3(b). For example, the trial court abused its discretion by denying Grand Jury remand when material evidence presented to the Jury was false or misleading.

Remember: failure to raise the issue through special action constitutes a waiver; it will foreclose your client from challenging the ruling. As effective counsel, you should consider a special action when a non-appealable ruling prejudices your client. Nonetheless, a special action is not an appeal, not something that your client is entitled to of right. The courts expect objective, professional judgment in assessing whether the ruling was wrong.[2] Even if wrong, consider whether it so clearly harms your client that immediate appellate intervention is "urgent". For instance, it is not "urgent," despite presentation of false material evidence to a Grand Jury, when probable cause could still be established without the false evidence.

Editor's Note: --CORRECTION-- Page 6 of the May 1992 issue incorrectly stated the effective date of the penalty assessment increase in *State v. Beltran.* The case summary should have reflected that the surcharge was increased from 37% to 40% effective October 1, 1990.

FOR THE DEFENSE

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B. Technically Appealable Issues

Courts sometimes decide special actions on matters that are technically appealable, but for all practical purposes, appeal would come too late to remedy the problem. This occurs most often in pretrial motions that would dispose of the prosecution altogether. For example, special actions have been heard on denials of suppression motions, motions to dismiss, motions in limine of critical evidence, striking allegations of priors, or refiling essentially the same charges after a dismissal with prejudice. Nonetheless, since those are technically appealable, the courts seldom accept special action jurisdiction of them. Struggling under burgeoning caseloads and eradicating the backlog, current appellate courts will not decide these kinds of issues in special action very often.

Be realistic when assessing whether you will be heard in special action on these types of matters. If you face pressing injustice, consider creative ways of establishing your "urgency". First overcome the problem that there is a "plain, speedy, and adequate remedy by appeal" in these issues. Argue that there nonetheless is no "equally plain, speedy, and adequate remedy by appeal" in your case. See Rule 3, comments. What makes your case "unequal" is your particular extraordinary circumstances and how you creatively frame them.

C. State-Wide Importance

"State-wide importance" is a term of art used in special action case law. It generally applies where the "urgent" circumstances arise from the broad impact the issue has on the practice of criminal law, as opposed to the impact it has on your specific case. Hence, a not-so-extraordinary issue may become more "urgent" if it affects numerous courts and parties. The rationale is that it is better to nip a pervasive problem in the bud than correct it in scores of appeals.

Interpretation of new legislation can have "state-wide importance". Shortly after the Victims' Bill of Rights enactment, many special actions were filed to ascertain its application. When DUI laws are amended, special actions quickly test the constitutionality of the changes.

Besides new law, some trial issues (like commonly encountered evidentiary questions or procedures) may have "state-wide importance". For instance, admissibility of the Child Sexual Abuse Accommodation Syndrome expert testimony as evidence of molestation has been challenged by special action. Additionally, rights to certain discovery could be challenged in a special action, especially where privacy or privilege is affected. For example, when the victim will not release relevant medical records, or the defense investigator is interviewed about client communications.

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However, just because an issue has wide impact on the practice does not mean it is ripe for "express lane" treatment of special action. Most appeal issues have wide ramifications, too. It is critical that you not just recite, in litany form, that your issue has "state-wide importance". Back up that claim. Detail solid reasons why your issue cries out for a definitive policy statement. Support it with evidence of how widespread it occurs. For example, if contesting admissibility of DNA testing (since recent research questioned it), attach documentation or affidavit of a knowledgeable professional reflecting the number of sex crimes using DNA tests.

D. Inconsistent Rulings

When different trial courts interpret or apply the law inconsistently, special action is appropriate. For instance, the Court of Appeals recently issued an opinion where some Superior Court judges ruled a violation of home arrest could result in a new charge of Escape, while other judges ruled that it was merely a violation of release terms. Conflicting rulings were quickly put to rest thanks to "express lane" treatment.

This is a traditional appellate court function: resolving conflicts between lower courts. The "urgency" supporting special actions under these circumstances arises from two things. First, if many judges issue inconsistent rulings, the conflict starts to take on "state-wide importance"; it has broad impact -- at least some of which is error. Second, inconsistent treatment undermines crime deterrence which needs consistent, predictable outcomes. The courts want to encourage deterrence, but also prevent a miscarriage of justice occurring when defendants engage in crime reasonably expecting lighter punishment. Develop these policy reasons in your special action.

If your special action arises from inconsistent rulings among trial courts, collect a number of minute entries or transcript excerpts to substantiate your claim. You may want to send a memo to other Public Defenders or check with the training supervisors for other instances of these rulings. Examine the facts behind each ruling; be sure that the inconsistencies are not distinguished by different facts. Attach all documentation in the Appendix to the special action.

You may find inconsistencies between Divisions 1 and 2 of the Court of Appeals. If so, file your special action in the Supreme Court.

E. The Defendant's Compelling Circumstances

Courts have entertained special actions when the petitioner has particularly compelling personal circumstances that, in the interest of justice, make "express lane" treatment urgent. This may occur when the defendant has such a short sentence that his appeal would not be heard by the time he is released. Six-month DUI sentences often face this dilemma. Judge Fidel cautions that this situation alone is not usually sufficient; after all, the defendant can ask for an expedited appeal under those circumstances. However, very short sentences, especially when there was clear error, may be considered in special action.

Other compelling circumstances can establish "urgency". Establish why it is especially unjust that your client wait. For instance, he is wrongly convicted of molestation and is being assaulted in prison; or, she is due to give birth soon and her baby would be taken from her; or, he is dying of AIDS and should be in a hospice surrounded by friends and family. Establish that the conviction or sentence is so clearly erroneous that it would be swiftly overturned on appeal; this is not the place to ask the court to decide new law or make public policy statements.

F. Remnants of Writs

Arizona's special action procedure replaced common law writs of mandamus, certiorari, and prohibition. Rule 1(a). Arizona Supreme Court Justice Stanley Feldman noted that special actions did not abolish those writs; instead it joined them under one modern form. Hence, whatever relief was available under those common law writs is still available under special action.

Mandamus compelled "performance of an act which the law specifically imposes as a duty resulting from [a judge's office]" when there is not a plain, adequate and speedy remedy at law. A.R.S. Sec. 12-2021. Originally, mandamus applied only when a trial court had no discretion and was obligated to follow the law, but did not. Eventually, mandamus was broadened to cases when a trial court had discretion, but abused it. *Rhodes v. Clark*, 92 Ariz. 31, 373 P.2d 348 (1962). For example, mandamus could enforce clear, speedy trial or double jeopardy violations.

Certiorari and prohibition apply when a trial court "has exceeded its jurisdiction and there is no appeal, [or] . . . a plain, speedy and adequate remedy available." A.R.S. Sec. 12-2001. Originally, they were narrowly applied to technical jurisdictional violations like improper venue or statute of limitations. Like mandamus, certiorari and prohibition were also broadened; a trial court did not have authority (jurisdiction) to abuse its discretion. Certiorari applies when the trial court has taken action and completed the challenged act. Prohibition applies when the trial court has only threatened to take action or partially acted.

The case law before 1970 (when the Rules of Special Action were promulgated) deciding these writs applies to special actions. Use it as authority.

II. Where To File A Special Action

If filing a special action from a justice or city court, you normally file it in Superior Court. Art. IV, sec. 6 of the Arizona Constitution, A.R.S. Sec. 12-124, and Rule 6 give the Superior Court appellate jurisdiction over city and justice courts.

If filing a special action from a Superior Court order, you generally file it in the Court of Appeals. Art. VI, sec. 9, of the Arizona Constitution, A.R.S. Secs. 12-120.21 and 12-120.22, and Rules 1, 4, 7, and 8 allow the Court of Appeals to: 1) decline jurisdiction; 2) grant jurisdiction and decide the merits; or 3) transfer to the Supreme Court.

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You also can file an original special action from a Superior Court order in the Arizona Supreme Court. Art. VI, sec. 5 of the Arizona Constitution and Rules 1, 4, 7, 8, and 9 allow the Supreme Court to: 1) decline jurisdiction; 2) accept jurisdiction and issue an opinion on the issues raised in the petition for special action; or 3) transfer the matter to the Court of Appeals. In practice, however, Justice Feldman indicated that the Supreme Court very rarely accepts jurisdiction of original special actions. It might entertain one when Court of Appeals Divisions 1 and 2 gave inconsistent rulings on a matter, or where trial courts face new legislation or procedures sufficiently significant to warrant policy guidance from the state's highest court.

If you are considering filing a special action in the Supreme Court, Justice Feldman suggests submitting a copy of your pleadings to the prosecutor and duty Supreme Court justice, and seeking an informal hearing (both parties present). In that meeting, you would discuss whether the special action should be filed there. If the duty justice has a question concerning whether it should be there, he may discuss it with other justices. In most cases, the duty justice's decision whether to accept jurisdiction is final.

III. How To Stay Trial Court Proceedings

Filing a special action will not automatically stay or preserve your request to stay trial court proceedings. You must first seek a stay in your trial court (exhaust your remedies). In your request for a stay, explain why it is necessary, e.g., trial will be over, thus mooting the issues raised in the special action. Arizona Court of Appeals Judge Susan Ehrlich indicated that your argument should apply an "irreparable harm" analysis. Rule 5 governs appellate interlocutory stays. The Appellate Court will not rule on your request for a stay unless the trial court has denied it. Whatever the trial court decides, you must include a copy of the order staying or denying a stay with your special action.

If trial is imminent, if the judge delays ruling on your request for a stay, or sets the hearing on your stay just before trial, move for a stay immediately in the Appellate Court as well as the trial court. In your appellate motion, explain your predicament: your stay may not be decided by the trial court until too late to give the Appellate Court time to consider it, and you do not expect the trial court to grant it.

IV. Rules For Special Actions

There are nine Rules for special action which apply to criminal special actions. Rules 1, 3, and 5 have been addressed earlier. Rule 2 describes the parties who may initiate and who must be joined in special actions. The complaint for special action must name your client (petitioner) and join not only the State (real party in interest), but also the judge (respondent). Rule 4 (a, b) covers venue. Any special actions arising from city or justice court must be filed in the Superior Court of the county where those courts are located. Petitions for special action filed in the Court of Appeals must be filed in the division with territorial jurisdiction over the county where the trial court is located. Rule 4(c) provides that service of process is governed by Rule 4 of the Arizona Rules of Civil Procedure, unless otherwise specified by the court.[3]

Rule 4(d), recently amended in May of 1992,[4] mandates that the petition for special action must contain a complaint, which is verified or accompanied by affidavits or other proof. Rule 7(e) as amended, requires that the petition for special action consists of a single document; it should include a jurisdictional statement, statement of material facts and issues, citations, statutes and appropriate references to the record, argument explaining your position on the issues, and the reasons supporting your argument. All references to the record must be supported in an appendix containing copies of the pertinent portions of the record. If the appendix exceeds 15 pages, it must be fastened separately from the petition. Unless permission is granted by the court, petitions should not exceed 30 pages (exclusive of the appendix). The reply must not exceed 15 pages.

Rule 6 governs the type of judgment a Superior Court magistrate may grant when rendering relief requested pursuant to a special action. Rule 7(b) provides that if you bring your special action in an Appellate Court, but it could have been initiated in a lower court, you must show why it is more appropriately brought in the higher court. For example, if you file a special action from a justice court decision in the Court of Appeals you must explain why the Court of Appeals, rather than the Superior Court, is the better court to review it. If you have not sufficiently explained why, the Appellate Court may transfer or even dismiss your special action.[5]

Rule 8(b) allows you to file a petition for review of the Court of Appeals ruling on your special action. Note that you can also file an original special action in the Supreme Court as a means of reviewing the Court of Appeals decision. A copy of the Court of Appeals decision must be attached to the petition for review or new special action explaining why the Supreme Court should accept jurisdiction. Without exceptional circumstances, the Supreme Court will usually summarily dismiss it. If the Supreme Court accepts jurisdiction and renders a decision, the losing party may petition for reconsideration, as provided in Rule 9(1). The court's order is final immediately unless a motion for reconsideration has been made. Rule 9(2).

V. Writing Tips

All pleadings must be written in plain English. Spare the legalese like, "Comes now the Petitioner". Write concisely. The judges who read your special action are swamped with work. Judge Fidel suggests including a table of contents as a guide to summarize the issues and set forth the arguments to follow. Christopher Johns is compiling a collection of special actions that you may look at for guidance in writing your own.

Provide a complete trial court record, include all minute orders, both parties' pleadings, and all pertinent documents as exhibits. Tabs or colored paper should separate exhibits. Be sure to include all citations to authority within your text.

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Make at least 13 copies of your petition. They would be distributed as follows:

original plus 6 copies to be filed;
1 copy to your prosecutor;
1 copy to your prosecutor's appeals section;
1 copy to the Chief of Arizona Attorney General's Criminal Division;
1 copy to the trial judge (respondent);
1 copy for your case file;
1 copy for your client;, and
1 copy for Christopher Johns' sample special actions file.

Any other parties of interest should also receive copies.

Last, but not least, appellate judges are people who respond to clear, well-reasoned arguments, just like trial jurors and judges. Be brief; get to the point. Recency and primacy applies, so try to grab their attention in the table of contents, introduction, and concluding paragraph.

VI. Conclusion

Though courts rarely accept jurisdiction, special actions are an appellate avenue that must be considered in preserving certain important procedural rights, challenging new laws and issues of state-wide importance, or resolving conflicts within court systems. Whenever you encounter these circumstances, you should consider whether a special action would be appropriate.

Our thanks to Justice Feldman and Judges Ehrlich and Fidel who graciously agreed to be interviewed for this article.

Endnotes:

1. One of the most common instances is when a Superior Court denies a request to remand for a redetermination of probable cause. Rules 12.9 and 5.5, Ariz. R. Crim. P., govern those motions. The only chance your client has to challenge a finding of probable cause is to file a motion to remand to the Grand Jury within 25 days of the filing of the transcript or the date of the arraignment -- whichever is later. The only way to preserve the issue on appeal is by filing a special action, if appropriate.

2. Arizona Court of Appeals Judge Susan Ehrlich cautioned that you should not file frivolous special actions. Additionally, do not include every possible related issue or fact. Special actions are limited inquiries; focus on one or possibly two decisive issues. It is also improper to file a special action just for delay or to force a better offer. Take care to demonstrate your good faith. Rule 7(e) authorizes sanctions, though referring to civil matters. The courts have not decided whether to impose sanctions against criminal defense counsel or defendants yet.

3. In practice in criminal special actions, service of process is normally accomplished by mailing rather than personal service. If there is any question whether that will be acceptable, ask your responding parties or personally serve process.

4. Copies of the May 1992 Amendments to the Rules for Special Actions are available through Christopher Johns.

5. According to Noel Dessaint, Clerk of the Arizona Supreme Court, the Clerk's Office may not allow a special action to be filed there (instead of in the lower court) without satisfying Rule 7 requirements. ^

Grand Jury Remands

By Peggy M. LeMoine

The United States Supreme Court has recently issued a decision that removes one of our mainstays in getting grand jury remands under federal due process -- *Crimmins* motions asserting that the prosecutor failed to fulfill his obligation to present to the grand jury any "clearly" exculpatory evidence in his possession.

Federal Law

A prosecutor now has no legal obligation to present exculpatory evidence in his possession during federal grand jury proceedings. In an opinion written by Justice Scalia, the court stated that to require "the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body". *U.S. v. Williams*, No. 90-1972, 1992 Lexis 2688, 60 U.S.L.W. 4348 (May 4, 1992).

Williams was indicted by a federal grand jury on seven counts of "knowingly mak[ing] [a] false statement or report . . . for the purpose of influencing . . . the action [of a federally insured financial institution]". Williams allegedly supplied several banks with "materially false" statements that overstated his current assets and interest income in order to persuade the banks to grant his loan requests. The government did not present Williams' general ledgers, tax returns, or his testimony in bankruptcy proceedings, which showed that Williams regularly accounted for the notes receivable and interest the same way he did in his statements to the bank. Williams argued that this exculpatory evidence showed he had no intent to mislead the banks, and thus directly negated an essential element of the offense.

Williams argued that *United States v. Page*, 808 F.2d 723, 728 (10th Cir. 1987) mandated that the government present "substantial exculpatory evidence" to the grand jury, that the government failed to fulfill this obligation, and that the indictment must therefore be dismissed. Justice Scalia found that the disclosure rule required by the Tenth Circuit exceeded its authority. While it is clear the courts' supervisory power over the grand jury can be used to enforce legally compelled standards of prosecutorial conduct, this power does not extend to prescribing the standards of prosecutorial conduct, because the grand jury is a separate institution from the courts over whose functioning the courts do not preside.

(cont. on pg. 6)

The grand jury's function is to assess whether there is an adequate basis for bringing a criminal charge, not to determine guilt or innocence. The grand jury has no duty to hear any evidence beyond what it needs to determine if an indictment is proper. If the grand jury has no obligation to consider all "substantial exculpatory" evidence, the prosecutor has no obligation to present such evidence.

Arizona Law

The duty of the grand jury is to decide whether probable cause exists and that determination may be challenged only if the defendant is denied a substantial procedural right, or if fewer than nine grand jurors concur in the indictment. *State v. Baumann*, 125 Ariz. 404, 409, 610 P.2d 38, 43 (1980); 17 A.R.S. Rules of Crim. Proc., R. 12.7 and 12.9. Due process requires a fair and impartial presentation of the evidence. *State v. Emery*, 131 Ariz. 493, 506, 642 P.2d 838, 851 (1982).

The grand jury must be adequately informed of both the significant facts and the law necessary to apply those facts. *Crimmins v. Superior Court*, 137 Ariz. 39, 43, 668 P.2d 882, 886 (1983). Failure to do so results in a less than fair and impartial presentation and violates due process.

In *State v. Coconino County Superior Court Div. II, RPI Mauro*, 139 Ariz. 422, 678 P.2d 1386 (1984), our Supreme Court held, however, that absent a request from the grand jury, the state is not obligated to present exculpatory evidence, unless the evidence is "clearly exculpatory". Clearly exculpatory evidence is evidence of such weight that it would deter the grand jury from finding the existence of probable cause.

Summary

Williams removes federal due process grounds for any challenges to grand jury indictments based on the fact that the prosecutor simply failed to present exculpatory evidence in his possession. While the Arizona cases do not explicitly rest on state due process grounds for their conclusions, an argument can certainly be made that such is implicit in the holdings. Chief Justice Feldman, especially, seems concerned about upholding the function of the grand jury which "protect[s] citizens from overzealous prosecution". *See, Crimmins,* 137 Ariz. at 44, 668 P.2d at 887 (special concurrence); *Gershon v. Broomfield*, 131 Ariz. 507, 511, 642 P.2d 852, 856 (1982) (special concurrence) ([The grand jury functions] "as a protector of citizens against arbitrary and oppressive governmental action") (citation omitted).

Additionally, *Williams* does not change the rules that the courts' supervisory power can be used to dismiss an indictment because of prosecutorial misconduct such as failing to correct an erroneous presentation of evidence, or failing to adequately answer the grand jury's inquiries about a factor necessary to its determination of probable cause. The prosecutor still has a duty to insure that evidence within his knowledge is accurately presented. *See, Nelson v. Roylston*, 137 Ariz. 272, 276, 669 P.2d 1349, 1353 (Ct. App. 1983), quoting *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). This duty of good faith on the part of the prosecutor exists whether testimony is perjured, or merely misleading, if the testimony is material to the indictment. The prosecutor's failure to correct the record denies the defendant a substantial procedural right.

Author's Note: A special thanks to Donna Elm for supplying the background, initial research materials and editing suggestions for this article.

Endangerment Can Be An Undesignated Offense

By Robert W. Doyle

Can endangerment under A.R.S. Sec. 13-1201 be an undesignated offense? It would certainly be convenient. For clients charged with endangerment or related crimes, a plea to an undesignated offense would be beneficial. However, anyone looking up the annotated statute finds this squib:

"2. Classification of Offense

Endangerment is not an open-ended offense, since it is a felony only if it involves a substantial risk of death to another. *State v. Carpenter*, 141 Ariz. 29, 684 P.2d 910 (App. 1984)."

Reading this, everyone assumes that there is something special about endangerment that removes it from consideration as an undesignated offense.

A close reading of *Carpenter* shows that this headnote is not the holding of the case. In *Carpenter*, the defendant was convicted at trial of a drug offense. A prior conviction for endangerment was used to impeach the defendant's testimony. He successfully moved for a new trial on the grounds that his endangerment conviction was not designated a felony. On appeal, the state contended that even though his sentence was to "Endangerment, an open-ended offense," this was still a felony for impeachment purposes. In addressing the state's position, the court said,

"However, the state's reliance on these cases is misplaced. Those cases all concern truly open-end offenses. The crime of endangerment is not an open-ended offense."

State v. Carpenter, 141 Ariz. at 31. Whoever wrote the headnote for West Publishing Company apparently stopped reading at this point. A further reading of the case reveals that what Division II of the Court of Appeals intended to say was that on the record before it, the endangerment conviction did not establish a proper factual basis for a felony. The court further stated,

(cont. on pg. 7)

"A.R.S. Sec. 13-1201(H) makes it a felony only if it involved a substantial risk of death to another. No such finding appears in the sentence. Although the sentence does recite 'Pursuant to the defendant's prior plea of guilty to the crime of endangerment, a class 6 open-ended felony,'" it also contains the judgment of guilty to "Endangerment, an open-ended offense". Our record does not contain the plea agreement or any transcripts in the endangerment case. As we have already noted, the trial court deferred making any designation. When an offense is a felony only because of the existence of a necessary element that distinguishes it from a misdemeanor offense, it is not a felony in the absence of a determination that the element is present. In other words, if the appellee's sentence was for the crime of endangerment involving a substantial risk of imminent death to another, then it would be a felony until later treated as a misdemeanor under A.R.S. Sec. 13-702(H). Since it was never determined, on the record before us, that the offense was a felony, and since it did not involve dishonesty or false statement, it should not have been used to impeach the appellee in the instant case. See, Rule 609, Rules of Evidence, 17A A.R.S."

A close reading of *Carpenter* shows that it does not stand for the proposition that endangerment under A.R.S. Sec. 13-1201 is somehow exempt from consideration for an undesignated offense under A.R.S. Sec. 13-702(H). What it does state is that on the endangerment case record, there was no adequate basis to find that it had ever involved a substantial risk of imminent death to another. The opinion even mentions that the prior offense (endangerment) could be "treated as a misdemeanor under A.R.S. Sec. 13-702(H)". The only problem in *Carpenter* was the state of the record, not the statutes involved. The problem in the *Carpenter* case can easily be resolved in a plea agreement and change of plea proceeding so long as the factual basis and the record clearly show that the defendant recklessly placed another in substantial risk of imminent death.

Just an important as what *Carpenter* says is what it did not say. There is no analysis comparing A.R.S. Secs. 13-1201 and 13-702(H) to show why the former falls outside the provisions of the latter. Such analysis would be needed to support the headnote's conclusion that endangerment can never be an undesignated offense.

The more important question here is not to blindly trust the legal analysis of some anonymous commentator. Through that one mistaken headnote, some defendants have lost the opportunity for that particular undesignated offense plea. Never let someone else do your thinking for you. ^

A Second Look at *Juarez*

By Gary Kula

The scenario is common. The client is arrested for driving while under the influence of alcohol and is taken down to the police station for the breath test. During the course of the twenty-minute observation period, the arresting officer completes parts of his report, advises the client of his Miranda rights, commences questioning, and advises the client of his rights and duties under the implied consent law. Everything appears to be in perfect order. If you take a closer look, however, at the exact sequence of events during the twenty-minute observation period, and if you can nail down the times when specific warnings and rights were given, you may find a way to suppress the breath test results under the *Juarez* decision.

In the *Juarez* case (161 Ariz. 76, 775 P.2d 1140 (1989)), police officers advised the suspect that he could not call an attorney prior to making a decision whether to take the breathalyzer test. In *Juarez*, the Arizona Supreme Court ruled that informing a DUI suspect that he cannot call his attorney before deciding whether to take a breathalyzer test violates the right to counsel. The court went on to rule that absent a showing that the phone call would be disruptive to the ongoing investigation, the right to contact an attorney cannot be denied. In response to this decision, police departments no longer affirmatively state to the accused that they cannot call an attorney prior to taking the breath test. A disturbing trend has emerged, however, where police officers are using a delay tactic to effectively circumvent an individual's right to make a decision whether to speak to an attorney. Police officers commonly do this by advising clients of their rights and responsibilities under the implied consent law immediately prior to the end of the twenty-minute observation period.

In the cases which were consolidated in the *Juarez* decision, the Arizona Supreme Court specifically noted that there was a practice of waiting until the end of the twenty-minute observation period before the breath test operator informed the suspect of his rights and responsibilities under the implied consent law. In his discussion of this practice, Justice Cameron stated, "[u]nless there are compelling reasons requiring the operator to wait twenty-minutes before informing the driver of his rights and duties under the implied consent law, the defendant should be so notified at the beginning of the twenty-minute waiting period."

This language of the *Juarez* decision is often overlooked. Police officers commonly camouflage the fact that the implied consent affidavit was first addressed at the end of the twenty-minute observation period by not recording the time when it was read and explained. In order for you to determine whether the police officer waited until the end of the twenty-minute observation period before addressing the implied consent issues, you should look at the police report and construct a time table for each of the events and procedures which took place once your client arrived at the police station.

(cont. on pg. 8)

The first step in determining whether a *Juarez* motion may be used to suppress the breath test is to determine when the twenty-minute observation period started. You will find this information on the top of the operator's checklist. You should then look to the interview portion of the DR where the officer asks your client "What time is it now?"; it records not only his answer, but also the actual time. Given that this is about the seventh question asked by the police officer, you can get a pretty good idea as to when the Miranda rights were given during the course of the twenty-minute observation period. You must then turn to the narrative portion of the DR to determine when the police officer stated he explained the implied consent law in relation to the Miranda rights. Commonly, the narrative portion of the DR states that the accused was advised of his Miranda rights, that the accused freely agreed to answer any and all questions, that at the end of this interview, the accused was advised of his rights and responsibilities under the implied consent law.

If you do the math and factor in the amount of time necessary for the Miranda rights and the interview, and add to that the amount of time necessary for the police officer to fill-out the implied consent affidavit and explain all the rights and responsibilities under the implied consent law, you may find that the completion of the implied consent affidavit coincides with the end of the twenty-minute observation period. With the expiration of the twenty-minute waiting period, the accused is told to blow into the breathalyzer. If this is the case, as has been seen in an alarming number of cases, there may be a basis under *Juarez* for excluding the breath test results unless some compelling reason is shown by the police officer as to why the implied consent law was not explained at the beginning of the twenty-minute waiting period.

If it appears that your facts support a motion under this argument, it is important that you use your interview of the police officer to gather information about specific times and time periods.

This is one instance where a police officer's willingness to expound on his thoroughness in explaining the Miranda rights and the implied consent law may actually work in your favor as you do your time calculations.

It is safe to assume that when the justices stated in *Juarez* that the implied consent law should be explained at the beginning of the twenty-minute waiting period, they intended this to be done to allow the accused an opportunity to make an informed decision on whether to take a breath test. By intentionally waiting to advise the accused of his rights and responsibilities under the implied consent law until immediately prior to the administration of the breath test, police officers are surreptitiously denying our clients the opportunity to contact an attorney prior to the administration of the test. With the clock ticking on the twenty-minute observation period, a client who is advised of the implied consent law with little or no time remaining is effectively being denied the rights afforded to him under *Juarez*.

MVD UPDATE:

The following changes on the Admin Per Se cases A.R.S. Sec. 28-694 have taken place. The suspension time and reinstatement fee will no longer be waived by submitting the D.U.I. court dismissals to the Admin Per Se Unit (not even if the suspension action has not yet taken place due to a request for hearing).

If a hearing has been requested, the hearing officer will be responsible for determining if the dismissals are enough to overturn the suspension time.

The Admin Per Se Unit will still expunge the Admin Per Se action in dismissal cases <u>after</u> the suspension time is served.

For sample motion, see page 9.

PRACTICE TIPS:

<u>Attorney Comments in Presentence Reports</u>

The Maricopa County Adult Probation Department Presentence Division has developed specific procedures for reflecting attorney comments in presentence reports. According to Mary Walensa, Director of Presentence Investigations, presentence writers initiate contact with attorneys only when the presentence writer has a question or concern about the plea agreement. She recommends that attorneys wishing to make presentence comments contact the presentence writer assigned to the case at least ten (10) days prior to sentencing because of dictation and transcription time limits. The name of an assigned presentence writer can be obtained from LEGIS court information or from the Probation Department (ext. 3871). In order to insure that comments are included, it is recommended that attorneys forward them in writing by letter or memoranda using interoffice mail.

<u>Correcting Presentence Reports</u>

Presentence investigation reports follow our clients to the Department of Corrections and may be relied upon by correctional authorities for such things as initial classification and parole. Reports are also available to a reviewing court when a relevant issue has been raised and to a sentencing court for another conviction. Given that numerous benefits may be denied our clients based upon an erroneous presentence report, it is extremely important that they are correct. Merely stating on the record at sentencing that something is wrong or disputed does nothing to help the client unless the actual report is excised or rewritten.

Rule 26.6 specifically authorizes the trial courts to excise presentence reports in limited circumstances (diagnostic opinions, confidential information and information that would disrupt an ongoing police investigation). However, effective May 1, 1992, Rule 26.8 has been amended to provide a new subsection c. Previously, Rule 26.8(a) required that prior to the day of sentencing, notice had to be provided about objections to the presentence investigation. Subsection b provided for the special duty of prosecutors to supply mitigation for sentencing. New subsection c now provides that:

(cont. on pg. 12)

Editor's Note: Motion prepared by Craig A. McMenemy, ASU Student Extern, Maricopa County Public Defender's Office.

STATE OF ARIZONA
MARICOPA COUNTY

STATE OF ARIZONA,	)	
	)	No. CR *
Plaintiff,	)	
	)	MOTION TO SUPPRESS BAC
v.	)	TEST RESULTS
	)	
*,	)	(Assigned to the Honorable
	)	*)
Defendant.	)	
	)	

[Name of client] moves the court to suppress the accused's BAC breath test. This motion is based upon the Arizona Supreme Court's direction in *Juarez* that the Implied Consent Law should be read and explained to a DUI suspect at the beginning of the twenty-minute observation period before administration of a BAC breath test. Because the *Juarez* decision was violated in this case the BAC test results should be suppressed.

MEMORANDUM OF POINTS AND AUTHORITIES

Facts

On [date], [the accused] was arrested for driving while under the influence of alcohol. The accused was then transported to a police station and given a breath test. The breath test was administered at 1222 hours after a twenty-minute observation period (from 1202 to 1222), however, the police officer did not inform the accused of his rights and duties under Arizona's Implied Consent Law at the beginning of the twenty-minute period. The police officer did not begin to explain the implied consent law until 1217 hours. Immediately thereafter, the accused was told to give a breath sample.

Law

The Arizona Implied Consent Law presents a DUI suspect with a formidable legal choice:

1) Either the suspect submit to a breath test and risk the incriminating results; OR
2) Refuse the breath test and automatically relinquish his or her drivers license for 12 months.

Facing this important legal decision, the DUI suspect's interest in exercising his constitutional right to counsel is particularly heightened.[1] The only restriction on this closely held right to counsel was stated in *Kunzler v. Pima County Superior Court*, 154 Ariz. 568 744 P.2d 669 (1987). In *Kunzler*, the Arizona Supreme Court held that:

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[1]The Sixth Amendment of the United States Constitution and art. 2, §24 of the Arizona Constitution guarantee a criminal defendant's right to counsel. Rule 6.1(a) of the Ariz. R. Crim. Pro. statutorily codifies the federal and state constitutional right to counsel by mandating that:

> [T]he right to be represented shall include the right to consult in private with an attorney, or his agent, as soon as feasible after a defendant is taken into custody . . . .
> (Emphasis added).

> . . . in a criminal DUI case, the accused has the right to consult with an attorney, if doing so does not disrupt the investigation. Id. at 154 Ariz. at 569, 744 P.2d at 670.

In *Juarez*, 161 Ariz. 76, 775 P.2d 1140 (1989), the Arizona Supreme Court explicitly recognized that the twenty-minute observation period prior to a breath test, mandated by A.R.S. §28-692.03(A)(3), provides a window of time during which a DUI suspect should be afforded the opportunity to seek the advice of counsel. The court reasoned that the attorney-client communication during this twenty-minute observation period would not normally interfere with the ongoing DUI investigation in violation of *Kunzler*. The justices in *Juarez* made this point clear by stating:

> We cannot imagine many cases where this would be a disruption of the procedures followed by the police in preparing to administer a breath test to a driver. Id. at 161 Ariz. at 81, 775 P.2d at 1144 (1989).

In its opinion, the court expressed concern about the practice of waiting until the end of the observation period before advising the accused of the Implied Consent Law. Justice Cameron, writing for a unanimous court, stated:

> Unless there are compelling reasons requiring the operator to wait twenty-minutes before informing the driver of his rights and duties under the Implied Consent Law, **the defendant should be notified at the beginning of the twenty-minute period**. Id. at 161 Ariz. at 81, 775 P.2d at 1144. (Emphasis added).

Such a practice is well-reasoned since it allows for an accused's constitutional right to counsel to be adequately protected without unduly infringing upon the state's interest in aggressively pursuing a DUI criminal investigation.

Argument

In this case, the *Juarez* court's direction that an accused should be notified of his rights at the beginning of the twenty-minute observation period was violated. In this case, the observing police officer did not inform the accused of his legal choices under the Implied Consent Law at the beginning of the twenty-minute period. Instead, the police officer, for no apparent reason, delayed informing him of his rights under the Implied Consent Law until minutes before the end of the twenty-minute observation period. Further, the police officer's report did not indicate any "compelling reasons" pursuant to *Juarez* for this delay. Id. at 161 Ariz. at 81, 775 P.2d at 1144.

Certainly, the delay in informing the accused of the Implied Consent Law infringed upon his right under *Juarez* to a full opportunity to locate an attorney's phone number, contact the attorney, briefly explain the facts to the attorney, and elicit the attorney's advice. As a result of this violation of *Juarez*, the accused was unjustifiably presented with two hollow choices:

(1) Either to submit to the breath test without any opportunity to seek counsel and risk the incriminating results; **or**

(2) Seek counsel's advice and risk a constructive refusal of the breath test (resulting in loss of his license for twelve months) if such advice could not be reasonably obtained within the waning moments of the twenty-minute period.

In either choice, the accused is denied meaningful opportunity to seek counsel's advice as suggested in *Juarez*.

The remedy for this violation of the right to counsel should be commensurate with that provided in *Juarez*: BAC evidence obtained where the accused was not informed of the Implied Consent Law until the end of the twenty-minute period should be suppressed.

Conclusion

In essence, *Juarez* stands for the well-reasoned proposition that:

(1) Where an accused faces the significant legal decision presented by the Implied Consent Law; and

(2) there exists a twenty-minute time period in which such decision may be assisted by counsel without unduly interfering with the investigative process;

then the accused should not be unreasonably denied the full opportunity to exercise his constitutional right to seek counsel's advice during the allotted twenty-minute waiting period. In the present case, there is no doubt that the observing police officer abrogated the Arizona Supreme Court's language in *Juarez* by unjustifiably failing to inform the accused of the Implied Consent Law at the beginning ot the twenty-minute period. As a result, the court should follow the reasoning in *Juarez* and suppress the illegally obtained evidence of the accused's BAC.

DATED this _____ day of *, 1992.

DEAN TREBESCH
Maricopa County Public Defender

By_____
*
Deputy Public Defender

"In the event that the court sustains any objections to the contents of a presentence report, the court may take such action as it deems appropriate under the circumstances, including, but not limited to:

1. Excision of objectionable language or sections of the report.
2. Ordering a new presentence report with specific instructions and directions.
3. Directing a new presentence report to be prepared by a different deputy probation officer.
4. Ordering the original (objectionable) presentence report sealed."

This rule change makes the task of protecting clients from objectionable materials easier and more explicit. Objectionable material must be removed from presentence reports and the courts file in order to adequately protect the client.

Criminal Code Changes

As of press time, the final bill of the Criminal Code still has not been passed out of conference committee and forwarded to the governor. Assuming, however, present compromises are enacted, practitioners can look forward to seeing elimination of Hannah priors in the current form and gradation of sentences based on quantity of some drugs, so that there is a drug threshold to discriminate between addict/users and drug dealers. *for The Defense* will do a more comprehensive analysis when the final bill is passed.

Experimental Rule 5.4(e)

New Rule 5.4(e), of the Arizona Rules of Criminal Procedure, will allow justices of the peace or justices of the peace pro tempore to immediately hold arraignments or take a plea of guilty or no contest if a plea agreement is reached. Presently, the rules of procedure prohibit a magistrate who is not a superior court judge or court commissioner to conduct an arraignment or take a guilty or no contest plea. While the new rule will allow a justice of the peace or justice of the peace pro tempore to conduct an arraignment or take a guilty or no contest plea, it only will be permitted with the written agreement of the client, the client's defense attorney and the prosecutor. Further, the rule will be limited to application in Maricopa County's Justice Court Felony Center. Hence, only those justices of the peace or justices of the peace pro tempore conducting proceedings in the new Justice Court Felony Center in Maricopa County could apply the rule.

Fines in Lieu of Probation

An often overlooked statute allows trial courts to impose a fine instead of probation (even for probation violations). However, it is applicable only for class 5 and 6 felonies, as well as misdemeanors. Ariz. Rev. Stat. Ann. Section 13-603(E) provides that "[i]f a person is convicted of an offense and not granted a period of probation, or when probation is revoked" the court can impose a term of imprisonment or "[a] fine . . . ." "[If] the conviction is a class 2, 3 or 4 felony, the sentence cannot consist solely of a fine . . . ."

Lesser-Included Offense Jury Instruction

An argument can be made that Standard Criminal Jury Instruction 22 (RAJI Criminal) should be objected to when you have a lesser-included offense case (or a better instruction submitted). Standard Criminal 22 provides that "you may find the [accused] guilty of the less serious crime only if you find unanimously the state has failed to prove the more serious crime beyond a reasonable doubt but has proved the less serious crime beyond a reasonable doubt". Notes to the RAJI point out that our Arizona Supreme Court has approved this requirement in *State v. Wussler*, 139 Ariz. 428, 670 P.2d 74 (1984) and *State v. Staatz*, 159 Ariz. 411, 768 P.2d 143 (1988).

In both of those cases, Justice Feldman wrote concurring opinions. Justice Feldman, now presiding Chief Justice, wrote that the better rule for both the prosecution and the accused would be to allow the jury to consider lesser-included offenses when they (1) agree on acquittal of the charged offense, or (2) when they cannot agree on an accused's guilt of the charged offense. Justice Feldman's reasoning in *Wussler* may be reviewed to make a record on the use of this jury instruction. As an alternative, practitioners may consider using the prior 1980 Recommended Arizona Jury Instruction (Criminal 1.03).

Submissions of Cases on the Record

When submitting a case on the record, practitioners should be mindful that our Arizona Supreme Court has articulated that trial courts must give at least six explicit warnings. *State v. Avila*, 127 Ariz. 21, 617 P.2d 1137 (1980). The accused must be informed of the following: (1) the right to a trial by jury where she may have representation by counsel; (2) that the issue of guilt or innocence will be decided by the judge based solely upon the record submitted; (3) the right to testify on her own behalf; (4) the right to confront the witnesses against her; (5) the right to compulsory process for obtaining witnesses in her favor; and (6) the right to know the range of sentence and special conditions of sentencing. Failure to insure that all of these issues are explained during the submittal may result in the submission's reversal on appeal.

Surrebuttal Closing Argument

In handling an insanity defense case, practitioners can rely upon Rule 19.1(a) and *State v. Turrentine*, 152 Ariz. 61, 730 P.2d 238 (App. 1986) to request surrebuttal closing argument for clients. Since the burden of proving insanity is by clear and convincing evidence, Rule 10.1(a) and the *Turrentine* decision grant trial courts the discretion to allow an accused to make surrebuttal closing argument.

Time for Filing Rule 12.9 Motions

Rule 12.9 has been amended to provide for the filing of a motion for re-determination of probable cause either 25 days after the transcript has been filed or 25 days after the arraignment is held, whichever is later. This change corrects the problem of unserved indictments.

(cont. on pg. 13)

Waiver of Presence at Arraignment

Rule 14.2 has been amended to provide that a client may waive his appearance at the arraignment by filing a written notarized waiver signed by the accused and his attorney. The client and attorney, within 20 days after the arraignment, must also file a notarized affidavit acknowledging that the client has been advised of all scheduled court appearances. ^

Training Calendar

June 01-26

The MCPD Office will be conducting "New Attorney Training" for the two new attorneys added to our staff. Training includes an orientation, mock trial, direct and cross-examination exercises, as well as lectures and hands-on experience in most areas of criminal practice. Training is conducted by the Training Director and trial group coordinators.

July 08

The MCPD Office will sponsor "Treatment: A Sentencing Option" from 1:30 p.m. until 4:30 p.m. in the Training Facility for attorneys. An earlier session will be held in the morning for support staff. The faculty includes William Chambreau, a nationally known sentencing advocate from New Mexico; APO Marilee Dal Pra and the Honorable B. Michael Dann.

August

The MCPD Office will sponsor a writing seminar for appellate and trial attorneys with ASU writing professor Kathryn Harris. Time and place to be announced.

Our office will sponsor a support staff, in-house seminar on "Assertiveness in a Law Office; Becoming More Effective" with Michael Tansy, certified counselor. Details will be announced in July.

September

The MCPD Office will sponsor a "Client Relations" seminar addressing the issues of professionalism in dealing with client's, court staff and other facets of the criminal justice system. Time and place to be announced.

Our office will repeat our support staff, in-house seminar "Legal Citations" with Christopher Johns, our Training Director, speaking. Details will be announced later. ^

Arizona Advanced Reports

State v. Cuffle
107 Ariz. Adv. Rep. 8 (SC, 2/27/92)

Defendant pled no contest in 1975 to murder and kidnapping charges. The case was remanded on appeal to determine if the defendant understood the nature of the offenses. At the hearing, the prosecutor called defendant's former counsel to testify. The defendant objected that this violated the attorney/client privilege. The court ordered the attorney to testify. Defendant had waived the attorney/client privilege. His claim that he was unaware of the nature of the charges at the time he entered the plea implicitly questioned the competency of counsel. A defendant is not allowed to use the privilege as a shield to block inquiry into an issue that he has raised.

Defendant argues that the trial court erred in admitting an opening brief from defendant's federal appeal. Defendant claims this brief was not relevant and lacked proper foundation. The brief was relevant to show that the defendant had waived the attorney/client privilege by claiming ineffective assistance of counsel at the federal level. As to foundation, any error was harmless because the trial court specifically did not rely on defendant's federal claims to find waiver.

Defendant claims he received ineffective assistance when the judge ordered his former counsel to testify. Counsel testified only about the specific claim that defendant had not been properly advised. Defendant has failed to show ineffective assistance of counsel. Counsel did not render deficient performance by testifying when ordered to do so. The court also relied on testimony other than counsel's to reach its decision. No ineffective assistance occurred.

Defendant claims the record fails to show he understood the nature of the charges to which he pled. The record shows defendant was present at the original plea hearing. The findings from the court show that defense counsel's customary practice was to properly inform defendants, though he had no specific recollection about this case. The court also considered information from the psychiatrist who performed the Rule 11 exam, defendant's adult probation officer and the investigating officer. The entire record makes an affirmative showing of understanding. [Presented on appeal by James H. Kemper, MCPD.]

Editor's Note: State v. Cuffle appeared in last month's issue. However, several edits were inadvertently omitted. Readers should rely upon this summary to accurately reflect the defendant's claims of ineffective assistance of counsel.

(cont. on pg. 14)

Volume 108

State v. Miller
108 Ariz. Adv. Rep. 51 (CA 2, 3/13/92)

The real party in interest was charged with contracting without a license, a misdemeanor. Defendant requested a jury trial in justice court but was denied. The superior court granted the request for a jury trial after a special action petition, and the state then filed a petition for special action. A criminal defendant is only entitled to a jury trial for a serious crime. "Serious crimes" are those where 1) the defendant is exposed to a severe penalty, 2) the act involved moral turpitude, or 3) the crime has traditionally merited a jury trial. The potential for six months in jail and fines is not a severe enough penalty and contracting without a license was not a crime at common law. The crime does not involve moral turpitude as it is not an act of a depraved and inherently base person. The crime requires no mental state and the moral character of the perpetrator is not in question. The degree of humiliation and damage to reputation caused by conviction does not matter. No jury is required.

State v. Archie
108 Ariz. Adv. Rep. 47 (CA 2, 3/12/92)

Defendant was charged with kidnapping, sexual assault and sexual abuse. A first trial ended with a deadlocked jury. Before the second trial, the victim moved to Indiana. The state moved to use the victim's former testimony at the second trial under Rule of Evidence 804(B)(1). The state claimed that they were unable to locate the victim in Indiana but offered no affidavits nor unsatisfied returns of service. The trial court denied the motion and granted a continuance. The state then moved for a request for the attendance of an out-of-state witness under A.R.S. Sec. 13-4091. The day before trial, the state again moved to use the former testimony. The prosecutor avowed that the victim had been served and received a plane ticket but had not appeared. The trial judge allowed the former testimony to be used at trial finding that the state made a good faith effort to obtain the victim's presence. The trial judge also denied defendant's motion to disclose the victim's lack of cooperation to the jury. The former testimony was read to the jury and the defendant convicted.

Defendant claims that the victim was not unavailable and that the former testimony was improperly admitted. The prosecution must make a good faith effort to obtain the witness's presence at trial. The good faith effort must be proven by competent evidence, sufficient to convince the court that the witness in fact cannot be produced. The prosecutor failed to properly prove a good faith effort. A simple statement by the prosecutor that the witness has not appeared for trial provides no facts for which the trial court may determine whether a good faith effort has been made. There is not competent evidence in this case of any action taken by the out-of-state authorities pursuant to the Uniform Act. Presented with nothing more than the prosecutor's avowal that the victim had been served but did not wish to appear, the trial court lacked any evidence from which to conclude that the victim in fact could not be produced. The Uniform Act provides for a recommendation that a witness be taken into custody and the state did not choose to do so. The state could have done more to secure the victim's presence by properly using the Uniform Act and asking the court to recommend that the victim be taken into custody. The conviction and sentence are reversed.

State v. Binder
108 Ariz. Adv. Rep. 10 (CA 1, 3/3/92)

Defendant was charged with six drug offenses. Prior to trial, defendant moved to represent himself at trial. The judge found that the defendant's knowledge of trial procedure was inadequate and denied the motion. The trial court erred in denying the motion to allow the defendant to represent himself. While the trial court may consider a defendant's background and experience, the defendant's legal knowledge is irrelevant to an assessment whether there is an intelligent and knowing waiver of counsel. The defendant made an unambiguous and unconditional request to represent himself; his lack of legal knowledge is not relevant. His failure to execute a written waiver also does not make his request ambiguous. The conviction and sentence are reversed.

State v. Bumgarner
108 Ariz. Adv. Rep. 49 (CA 2, 3/12/92)

Defendant was charged with possession of dangerous drugs for sale. Defendant claims that he received ineffective assistance of counsel because his public defender moved to withdraw based upon his caseload. Defendant claims prejudice because the resulting delay allowed potentially exculpatory taped interviews to be lost. Defendant has failed to show that such tapes ever existed or that their contents would be exculpatory.

Defendant also claims he received ineffective assistance of counsel where his trial counsel failed to file a motion to dismiss for lack of probable cause. The record shows that had such a motion been filed, it would not have been granted. Defendant also claims he received ineffective assistance of counsel because he was subject to a warrantless arrest without probable cause. The arresting officer's testimony showed probable cause for a routine traffic stop and arrest.

Defendant claims that the trial judge should have granted his motion for judgment of acquittal. In order to withstand a directed verdict of acquittal, the state's evidence must support a person's finding of defendant's guilt beyond a reasonable doubt. The circumstances of defendant's arrest, the drugs found and the defendant's inculpatory comments provide sufficient facts to support the conviction.

Defendant claims he was entitled to a *Willits* instruction because of the lost tapes. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. These tapes may never have existed and the record fails to indicate any bad faith. No *Willits* instruction was necessary.

(cont. on pg. 15)

State v. Ellis
108 Ariz. Adv. Rep. 28 (CA 1, 3/10/92)

Defendant was convicted of trafficking in stolen property. The trial judge imposed restitution based upon the purchase price of the property, despite its age. The standard for assessing restitution for personal property is the fair market value of the property at the time of the loss. Evidence of fair market value may include, among other things, whether the property was new when purchased, the original purchase price, how much time the owner has had the use of the property and the condition of the property at the time of the theft. The case is remanded for reconsideration for the amount of restitution. [Represented on appeal by Paul C. Klapper, MCPD.]

State v. Johnson
108 Ariz. Adv. Rep. 23 (CA 1, 3/10/92)

Defendant, on parole, was charged with misconduct involving weapons for possessing a deadly weapon as a prohibited possessor under A.R.S. Sec. 13-3102. The court instructed the jury that a person continues to serve a term of imprisonment in a correctional facility or detention facility even though released on parole. A prohibited possessor is any person who is at the time of possession serving a term of imprisonment in a correctional or detention facility. While a person on parole is in the legal custody of the Department of Corrections, being in custody is not synonymous with serving a term of imprisonment in a correctional facility. The statute, read as a whole, applies only to those actually confined in a correctional or detention facility. While the defendant may be a parole violator, he is not a prohibited possessor under A.R.S. Sec. 13-3101. The conviction is reversed. [Represented on appeal by James L. Edgar, MCPD.]

State v. Luque
108 Ariz. Adv. Rep. 32 (CA 1, 3/12/92)

Defendant was charged with a class 4 non-dangerous felony and a class 3 dangerous felony. The defendant had five non-dangerous prior convictions. At his jury trial, a panel of eight jurors was selected. Defendant did not object.

On appeal, defendant contends that he was entitled to a twelve person jury because the maximum sentence he could have received exceeded 30 years. The state responds that a jury of eight was sufficient because the defendant's maximum possible sentence was only 27 years. The state calculates this by determining that the dangerous conviction had a maximum of only 15 years because this was his first dangerous conviction and his non-dangerous prior felony convictions could not be used for enhancement. The state's position is contrary to *State v. Laughter*, 128 Ariz. 264 (1980), which holds that a defendant's first dangerous conviction can be enhanced as a repetitive non-dangerous conviction if he has non-dangerous prior convictions. The court finds that it was fundamental error to not select a twelve-person jury. While the defendant was acquitted of the class 3 dangerous charge and cannot be retried for it, he is entitled to a twelve-person jury under the Arizona Constitution, rejecting a contrary holding in *State v. Campos*, 97 Ariz. Adv. Rep. 22 (CA 2, 1991). The conviction is reversed and matter remanded for a new trial. [Represented on appeal by Spencer D. Heffel, MCPD.]

State v. Mullen
108 Ariz. Adv. Rep. 11 (CA 1, 3/3/92)

The court's opinion in *State v. Mullen*, 168 Ariz. 246 (App. 1990), is vacated and remanded to the superior court in light of *Florida v. Bostick*, 111 S.Ct. 2382 (1991). The question on remand is whether, when the defendant complied with the officer's request for identification, the encounter was coercive or consensual.

It is important to note that the court did not address the application of the Arizona Constitution, as the issue was not raised by the parties in the superior court. This case underscores the importance of challenging search and seizures under both the United States and Arizona Constitutions, and to make arguments specific to the Arizona Constitution where applicable. [Represented on appeal by James L. Edgar, MCPD.]

State v. Perez
108 Ariz. Adv. Rep. 21 (CA 1, 3/5/92)

Defendant pled guilty to attempted kidnapping and was placed on probation. The trial court deferred entry of judgment pursuant to A.R.S. Sec. 13-3601(G). The court also ordered that defendant pay the $100 felony assessment. Defendant argues that the trial court lacked jurisdiction to impose the felony assessment because he had not been adjudicated a felon. The court first finds that as no final judgment of conviction has been entered, the court has no appellate jurisdiction over the case. However, the court exercises its discretion to consider the matter as a special action. Since judgment has not been entered in this case, the defendant has not been convicted of a felony and the assessment cannot properly be ordered. The court did not have jurisdiction to impose an assessment. While defendant did not raise this issue at sentencing, the trial court did not have subject matter jurisdiction and subject matter jurisdiction cannot be waived. [Represented on appeal by Edward F. McGee, MCPD.]

State v. Ramsey
108 Ariz. Adv. Rep. 6 (CA 1, 3/3/92)

Defendant gave her two children up for adoption. Later, the defendant removed the children from their adoptive parents' home without parental approval. She was charged with and convicted of custodial interference. The trial judge granted the defendant's motion to defer entry of judgment of guilt and placed the defendant on probation under A.R.S. Sec. 13-3601(H). The state appealed.

The state claims that defendant does not meet the requirements of A.R.S. Sec. 13-3601(H) because her ties to her children were severed in the adoption. While her legal ties to the children were severed, the statute talks about blood relationships. A decree of adoption does not sever the blood relationship between a defendant and her children. The defendant was eligible to have the entry of judgment deferred under A.R.S. Sec. 13-3601(H). (cont. on pg. 16)

The state argues that the trial court erred when it deferred entry of judgment under 13-3601(H) without the required prosecutorial concurrence. The statute violates the doctrine of separation of powers. The prosecutorial concurrence requirement is an executive veto power that unreasonably impedes the judiciary's power to resolve criminal matters. The prosecutor's discretion to make or withhold a recommendation unconstitutionally encroaches on the judicial function. The court finds that the prosecutorial concurrence requirement is severed so that the rest of the statute remains operative. [Represented on appeal by Paul C. Klapper, MCPD.]

State v. Smith
108 Ariz. Adv. Rep. 52 (CA 2, 3/17/92)

Defendant was charged with theft and armed robbery. Prior to trial, the defendant stipulated that the value of the property exceeded $1,500 in exchange for the state's agreement that any sentences imposed would be served concurrently. Defendant was convicted and sentenced to presumptive consecutive terms of imprisonment. As all parties overlooked the stipulation at sentencing, appellant's sentences are ordered to run concurrently rather than consecutively.

Defendant claims that the trial judge erroneously enhanced his sentence on his dangerous offense with his prior non-dangerous convictions. A defendant convicted of his first dangerous offense may be sentenced as a repetitive non-dangerous offender with prior felony convictions. *See State v. Laughter*, 128 Ariz. 264 (App. 1980).

Defendant claims that the evidence was insufficient to sustain his conviction for armed robbery and theft. Some forty-five minutes after the robbery and a quarter mile from the stolen car used in the chase, defendant was found in possession of property taken during the robbery and the gun. Viewing the evidence in the light most favorable to upholding the verdict and considering the statutory presumptions, the convictions are affirmed.

State v. Zierden
108 Ariz. Adv. Rep. 31 (CA 1, 3/10/92)

The defendant was convicted of theft and sentenced. The trial court ordered the defendant to pay restitution for an uncharged forgery offense. While the trial court has an affirmative duty to require a defendant to make full restitution for the economic loss sustained by the victim, the trial court may order the defendant to pay restitution only for offenses which have been admitted, upon which he has been found guilty or upon which he has agreed to pay restitution. The defendant did make post-arrest statements to the police indicating his culpability. A suspect's admission to a police officer is insufficient for a court to impose an order of restitution. Ordering a defendant to pay restitution for a crime which he has not admitted in court poses the risk of serious due process error. The procedure used to bring the admission to the attention of the court must have guarantees of trustworthiness sufficient to justify imposing this burden upon the defendant. While the court does not set forth the appropriate procedure, they hold that an accused's statements to a police officer are an insufficient basis to order restitution. The restitution order was not premised on an adjudication of guilt, on an agreement to pay or on an obligation properly admitted by defendant. The order is reversed. [Represented on appeal by Helen F. Abrams, MCPD.]

May Jury Trials

April 30

Larry Grant: Client charged with child abuse, kidnapping, child molestation and sexual conduct with a minor. Trial before Judge D'Angelo ended May 07. Client found not guilty of kidnapping and guilty of all other charges. Prosecutor D. Greer.

Gerald A. Williams: Client charged with sexual assault (1 prior) and burglary. Trial before Judge Gottsfield ended May 07. Client found not guilty. Prosecutor J. Bernstein.

May 04

Linda K. Williamson: Client charged with possession of narcotic drugs. Trial before Judge Hertzberg ended May 06. Client found not guilty. Prosecutor M. Wales.

May 05

Carole A. Larsen-Harper: Client charged with aggravated DUI. Trial before Judge Hilliard ended May 07. Client found guilty. Prosecutor S. Brewer.

Louise Stark: Client charged with theft and trafficking in stolen property. Trial before Judge Dann ended May 18. Client found guilty. Prosecutor T. Doran.

May 06

Cecil P. Ash: Client charged with incest and three counts of sexual conduct with a minor. Trial before Judge Katz ended May 19. Client found not guilty. Prosecutor S. Evans.

James A. Wilson: Client charged with aggravated DUI. Trial before Judge D'Angelo ended in a mistrial May 07. Prosecutor R. Nothwehr.

May 07

Jerry M. Hernandez: Client charged with aggravated DUI and BAC .10. Trial before Judge Sheldon ended May 08. Client found guilty of aggravated DUI and not guilty of BAC .10. Prosecutor J. Beatty.

May 12

Karen Kemper: Client charged with two counts of aggravated assault (dangerous). Trial before Judge Schneider ended in a mistrial May 14. Prosecutor L. Ruiz.

(cont. on pg. 17)

May 13

Larry Grant: Client charged with possession of narcotic drugs. Trial before Judge Gottsfield; charges dismissed with prejudice. Prosecutor J. Wendell.

Kevin M. Van Norman: Client charged with attempted armed robbery. Trial before Judge Hendrix ended May 14. Client found guilty. Prosecutor T. Glow.

May 14

Cecil P. Ash: Client charged with criminal damage. Trial before Judge Sheldon ended May 20. Client found guilty. Prosecutor M. Barry.

James J. Haas: Client charged with aggravated DUI with a prior. Trial before Judge Dann. Client found guilty; client admitted prior for mitigated sentence. Prosecutor M. Sullivan.

May 15

Elizabeth S. Langford: Client charged with misdemeanor DUI (2nd offense). Trial before Judge Pro Tempore Strong ended May 18. Client found not guilty. Prosecutor T. Tejera

May 18

Catherine M. Hughes: Client charged with possession of narcotic drugs for sale. Trial before Judge Gottsfield. Client found not guilty; hung jury on lesser-included offense of possession. Prosecutor P. Davidon

William R. Stinson: Client charged with burglary and assault. Trial before Commissioner Jones ended May 28. Client found guilty. Prosecutor Blecker.

Leonard T. Whitfield: Client charged with aggravated DUI. Trial before Judge Portley ended with a hung jury May 27. Prosecutor D. Wolf.

Raymond Vaca: Client charged with aggravated assault (dangerous). Trial before Judge Hendrix ended May 21. Client found guilty. Prosecutor N. Miller.

May 19

Thomas M. Timmer: Client charged with possession of burglary tools. Trial before Judge Hilliard ended May 23. Client found guilty. Prosecutor M. Spizzirri.

May 20

Karen Kemper: Client charged with resisting arrest and trespassing. Trial before Judge Wilkinson. Client found not guilty of resisting arrest and guilty of trespassing ($50 fine). Prosecutor T. Doran.

May 22

Larry Grant: Client charged with two counts of sexual assault, kidnapping and burglary. Trial before Commissioner Jones. Client found not guilty on one count of sexual assault and burglary; guilty of kidnapping; hung jury on second count of sexual assault. Prosecutor V. Imbordino.

May 26

Slade A. Lawson: Client charged with aggravated DUI and BAC .10. Trial before Judge Sheldon ended May 28. Client found guilty of aggravated DUI; judgment of acquittal on BAC .10 charge. Prosecutor T. McCauley.

Daniel G. Sheperd: Client charged with first degree murder. Trial before Judge Anderson. Client found guilty. Prosecutor B. Shutts.

Louise Stark: Client charged with aggravated assault. Trial before Judge Hall. Client found not guilty. Prosecutor G. Thackery.

May 27

David L. Anderson: Client charged with aggravated assault. Trial before Judge Martin. Client found not guilty. Prosecutor M. Branscomb.

Robert C. Billar: Client charged with DUI. Trial before Judge Gottsfield ended May 29. Client found guilty. Prosecutor H. Schwartz. ^

Personnel Profiles

ARRIVALS:

Paul Thom started June 22nd as a Records Clerk. Paul, who has a B.A. in Economics from the University of Arizona, has worked in a variety of clerking positions, and last was employed handling numerous accounts for a local vending company.

DEPARTURES:

Mark Berardoni has accepted a contract to provide indigent defense services for the City of Phoenix, and will be leaving our office in July.

Additionally, Alex Gonzalez, Thomas Murphy, Bruce Peterson and Jeffrey Williams are leaving and going into private practice with county contracts for conflict of interest cases.

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SPECIAL NOTE:

Dennis Dairman will be sworn in as a Maricopa County Superior Court Judge on July 17th. Everyone from our office is invited to the ceremony which will take place at 12:30 p.m. in Room 402 of the Central Court Building. ^

Bulletin Board

NACo Achievement Award

On June 3rd, the National Association of Counties (NACo) advised our training division that we are the recipients of a 1992 NACo Training Program Achievement Award. The association noted that our program, which is designed to provide frequent, skill-enhancing training for both attorneys and support staff, ". . . successfully addressed a significant concern in your county and we are pleased to commend you for your efforts."

Yesterday . . . (Match the Past)

1. Carol Carrigan (Appeals)	A. As a 12-year-old, was yo-yo champion of Sioux City, Iowa
2. Gary Kula (A)	B. Flew 230 combat missions in Vietnam
3. Peggy Simpson (CSC)	C. Worked as a laundry supervisor at Grand Canyon National Park
4. Dan Sheperd (B)	D. As an 8-year-old, ranked as one of top three marble players in the City of Chicago
5. Kevin White (C)	E. Drove a taxicab in Boise, Idaho for three years
6. Carol Miller (Records)	F. Captain of high school basketball team in St. Clair, Michigan
7. Terry Adams (A)	G. While a teenager, took ten trips around the world as a merchant seaman
8. Tom Kibler (D)	H. Won Bluebonnet Bowl MVP award as quarterback for West Virginia University
9. Nora Greer (D)	I. Got suspended from high school for throwing blueberry pie at the English teacher
10. Bob Calleo (Polygrapher)	J. State of Mississippi high school history champion

ANSWERS:
1.F; 2.D; 3.E; 4.J; 5.H; 6.I; 7.A; 8.B; 9.C; 10.G